SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 589

WENDELL EVANS, *Petitioner*

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Wendell Evans, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in the above-entitled case on May 11, 1966.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is as yet unreported; it is printed herein as Appendix C.

JURISDICTION

The decision and judgment of the Court of Appeals for the Fourth Circuit was entered on May 11, 1966. (App. C-1) A timely petition for rehearing *en banc* was denied June 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix D.

QUESTION PRESENTED

Whether, in a diversity case, a federal district court affirmed by a circuit court of appeals, may properly grant summary judgment where:

(1) There are direct conflicts in the pleadings and affidavit of the plaintiff and the affidavits and answers to the interrogatories of the defendant on material facts;

(2) The premature grant of summary judgment restricts the plaintiff in his attempts to develop theories of liability which are latent in the case;

(3) The premature grant of summary judgment prevents the plaintiff from probing the defendant's answers to interrogatories in relation to the content of affidavits submitted by the defendant, as to material facts and information which is peculiarly within the knowledge of the defendant;

(4) The district court fails to either recognize the conflicts in facts, or to explain the materiality (or lack of same) of the facts in conflict, and where the court of appeals simply affirms the district court's determination that there are no genuine issues "upon the material facts in the case," without itself examining or explaining why the facts concerning which there are conflicts are not material.

STATEMENT OF THE CASE

This is a diversity case, arising in the United States District Court for the Eastern District of Virginia (Newport News Division). Petitioner, Wendell Evans, is a resident of Pennsylvania; respondent, Newport News Shipbuilding and Drydock Company (hereinafter Newport News or respondent) is a Virginia corporation. Petitioner was employed by the McLean Contracting Company, an "independent contractor" which, although maintaining its independent corporate status, has worked closely with respondent for many years. (App. A-1, A-2)*

Petitioner worked as a skilled welder and rigger. It was while working in this capacity that he was seriously injured on July 16, 1962. He was assisting in the erection of a steel crane when the accident occurred. Apparently a six-hundred pound structural steel plate, which was being hoisted into place, broke loose, knocking petitioner from the staging platform where he was working. Petitioner and the steel plate feel together forty feet to the ground below. The steel plate landed on top of petitioner, crushing him and causing serious internal injuries and numerous broken bones. (R. Vol. I, p. 74)

Petitioner filed suit against Newport News for compensatory and punitive damages, alleging as bases for recovery: that his injuries were proximately caused by the negligence of the respondent in failing to properly supervise the work; in not enforcing safety regulations; and in not supplying proper equipment for the safe conduct of the work, all in wanton and reckless disregard for the safety of petitioner. He sought

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* References are to the certified record filed in this Court containing the original papers, interrogatories, answers, and affidavits.

damages in excess of one hundred thousand dollars, plus punitive damages and costs. Petitioner specifically denied in his complaint that respondent was either his actual or statutory employer. (R. Vol. I, p. 1)

Respondent denied negligence, interposing the defense that petitioner was engaged in work which was a part of the regular "trade, business or occupation" of respondent, that he was therefore a statutory employee of respondent and was barred by the Virginia Workmen's Compensation Act from bringing a damage action since he had received workmen's compensation benefits from the insurance carrier of the McLean Contracting Company. (R. Vol. I, pp. 7-8)

Respondent subsequently filed a motion for summary judgment (this before discovery had begun), alleging that no material issue of fact existed in the case and that the petitioner's claim was barred by Sections 65-26, 65-37 and 65-99 of the Virginia Workmen's Compensation Act. (App. D-1, D-3) Respondent supported its motion with comprehensive affidavits designed to demonstrate that the work in which petitioner was engaged was a part of the regular "trade, business or occupation" of respondent.*

Petitioner filed a counter-affidavit, detailing the events surrounding his injury. (R. Vol. I, p. 74) In this affidavit, petitioner alleged that employees of Newport News had negligently mishandled him in transporting him to the Shipyard first aid station; that after he arrived at the first aid station and after respondent's employees had begun administering first

* These affidavits were from the plant engineer for the shipyard, McLean's Superintendent at the shipyard, and the claims manager of McLean's Insurance Carrier. (R. Vol. I, p. 12; p. 18; p. 20)

aid, they stopped aiding him upon discovering that he was an employee of McLean. Respondent's employees then told petitioner that "they couldn't take care of [him] there," and he was thereupon taken to Riverside Hospital. Petitioner estimated the time lapse at "around forty-five minutes." (R. Vol. I, p. 75) Petitioner also alleged that respondent had safety regulations in force covering the work and that the equipment supplied for the work did not meet the safety specifications. Moreover, he alleged that the Newport News "safety men" should have been around supervising the work, but that there were no safety men there at the time of the accident. (R. Vol. I, pp. 76-77)

Petitioner had submitted interrogatories to respondent and additionally submitted "further interrogatories." (R. Vol. I, p. 44; p. 51) Respondent's answers to these interrogatories conflicted in several material respect with petitioner's pleading and affidavit. Specifically, respondent denied that any of its employees either transported petitioner to its first aid station, or that petitioner was given first aid; it further denied having any safety regulations in force covering petitioner's work, or that it had any supervisory personnel who were responsible for the work. With respect to the work itself, respondent's answers disclosed that most of the cranes respondent had erected in its shipyard during the period 1948-1962 were erected in conjunction with McLean; that the crane involved in petitioner's accident weighed almost twice as much as most of the cranes previously erected; and that the crane was of a type which had only been erected once prior to the date of the accident. (R. Vol. I, pp. 59-60)

After a hearing, the District Court granted respondent's motion for summary judgment, accepting

its argument that petitioner's claims were barred by the Workmen's Compensation Act. (App. A-1, A-5) Petitioner's rehearing petition was subsequently denied. (App. B-1, B-2)

On appeal, the Fourth Circuit Court of Appeals affirmed the decision *per curiam,* finding that petitioner's claims were barred by the Workmen's Compensation Act and that

> "the record discloses no genuine issues upon the material facts in the case and they bring him squarely within the Act. Hence his sole remedy is the recovery of statutory compensation." (App., C-2)

A timely petition for rehearing *en banc* was denied without opinion. (R. Vol. II, p. 29)

REASONS FOR GRANTING THE WRIT

> "The summary judgment procedure, while justified in some cases, is made a handy instrument to let judges rather than juries try lawsuits and to let those judges try cases not on evidence of witnesses subject to cross examination but on ex parte affidavits obtained by the parties." Statement of Justices Black and Douglas, to accompany transmission of amendments of rules of civil procedure to the Congress, 374 U.S. 867 (1963).

This prophetic statement has direct relevance for the instant case. Here petitioner has in fact been deprived of his truly meaningful "day in court" by virtue of the short-circuiting summary judgment procedure utilized in this case. Petitioner respectfully submits that this case could readily serve as a suitable vehicle for this Court to review the summary judgment practice of the district courts, thereby enabling it to fulfill its prime responsibility for the proper functioning of the federal

judiciary and to exercise its authority over the interpretation of important issues of federal procedure. The use of the summary judgment procedure has all too often served to provide an early burial for potentially meritorious causes; moreover, its use in the instant case

> "marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway* v. *United States,* 319 U.S. 372, 397 (Black, dissenting).

a. Summary Judgment Was Inappropriate on the Question of Whether Respondent Was a Statutory Employer of Petitioner.

Petitioner has attempted to demonstrate in this case that respondent is an "other party" within the contemplation of Secton 65-38 of the Virginia Workmen's Compensation Act, and not a statutory employer under Section 65-26.* In rejecting this argument, the District Court, affirmed by the Court of Appeals, held, on the basis of the pleadings, the affidavits submitted by respondent and petitioner, and respondent's answers to interrogatories, that the welding and structural steel

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* The Virginia Workmen's Compensation Act purports to bar all claims by employees against either actual or statutory employers for actions arising out of working conditions, where the employer and employee have accepted the benefits and burdens of the Act. The fiction of "statutory employer" was created by statute to protect prime contractors from suits by employees of their subcontractors. If an injury occurs to an employee while his employer is doing the "trade, business or occupation" of the prime contractor, the employee has a right under Section 65-26 of the Act to recover workmen's compensation from the prime contractor (statutory employer). Under Section 65-38, a right of action against "other parties" is recognized so that if an injury occurs to an employee as a result of the negligence of an "other party," the employee may sue such other party on the basis of a common law action.

work performed by McLean was a part of the regular "trade, business or occupation" of respondent and that it was therefore petitioner's statutory employer.

Summary judgment was inappropriate on this point because petitioner had elicited information fom respondent's personnel through interrogatories which strongly suggested that the welding and structural steel erection of the crane involved in this case was not in fact a part of the regular "trade, business or occupation" of respondent. Specifically, respondent's answers to these interrogatories demonstrated that the crane petitioner was working on was a "whirler" type crane weighing 110 tons and that only one of the cranes erected in the shipyard during the period 1948-1962 was a whirler crane (this erected in 1962) and that this crane weighed only 60 tons. (R. Vol. I, pp. 59-60) The answers further demonstrated that respondent had never erected a whirler crane without McLean's assistance and that the 110 ton crane here concerned was the largest crane ever erected in the shipyard. Moreover, the interrogatories in question here were answered by a certain W. F. Metts, Assistant to the Personnel Manager, while the affidavit accompanying respondent's motion for summary judgment addressed to this point was signed by the plant engineer, one John W. Irvine. Petitioner attempted to test the truth of Mett's answers and prove them by noticing his deposition on April 6, 1965, which petitioner had a right to do under the terms of the Pre-Trial order in this case (R. Vol. I, pp. 54-55), which granted petitioner until July 5, 1965 to complete discovery. However, the hearing on respondent's motion for summary judgment was held on April 9, 1965 and it was subsequently granted, thereby precluding petitioner from

probing Mett's answers. The District Court's grant of summary judgment was *premature.* Petitioner should have been afforded an opportunity to test these answers and attempt further discovery as to whether McLean's work was in fact a part of the "trade, business or occupation" of respondent. This is especially true in view of the rule recognized in the Fourth Circuit that, if there is evidence which a jury could accept which would show that the work is not part of the "trade, business or occupation" of an employer, the case must go to the jury. *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82 (C.A. 4th, 1959).

b. Summary Judgment Is Inappropriate Where There Is Genuine Issue Between the Parties as to Material Facts, Especially Where the Resolution of the Dispute Is Important to the Development of a Theory of Liability of the Non-Moving Party.

Petitioner argued to both the District Court and the Court of Appeals that, even if respondent is deemed to be a "statutory employer" by virtue of the fact that the work here in question was a part of its regular "trade, business or occupation," it should nonetheless be *estopped* to plead the Virginia Workmen's Compensation Act in bar to petitioner's common law action for damages. This argument is based upon the fact that, through the words and actions of its employees, respondent *rejected* the employment relationship with petitioner, and failed to perform a duty which it owed to petitioner under the Act. Under Section 65-85 of the Virginia Code, an employer is required to provide an injured employee with medical aid. Respondent both failed and refused to provide petitioner with such aid; moreover, it compounded the harm done petitioner in that its personnel actually began treating him but

then failed and refused to continue such treatment. Petitioner argued that respondent should not be allowed to reap a benefit provided by the Act (by virtue of the statutory employer fiction), when it had failed and refused to assume any *burdens* imposed by the same Act.

Although this issue was clearly posed for the District Court's determination (R. Vol. I, pp. 128-134), it did not even pass upon it. The same argument was presented to the Court of Appeals; its brief opinion in no way alludes to or settles this question. Certainly it is no answer to this argument that the Compensation Act bars petitioner's suit. Such an answer begs the question mercilessly. Apparently both the District Court and Court of Appeals assumed that this issue could be answered by simply invoking the magic summary judgment rubric to the effect that "there are no genuine issues on any material facts."

Moreover, neither Court came to grips with the fundamental conflict existing on the question of whether petitioner was mishandled by respondent's personnel. Petitioner's affidavit clearly and unequivocally states that respondent's employees mishandled him in transporting him to the first aid station, began giving him first aid, and then refused to continue when they found out he was an employee of McLean. (R. Vol. I, pp. 74-75) Respondent's answer to petitioner's interrogatory on this point was that *none of its employees rendered first aid or otherwise attempted to aid petitioner after his fall.* (R. Vol. I, p. 58) This conflict clearly presents a material issue of fact in this case which cannot be settled by a judge by way of summary judgment. "On a motion for summary judgment, the court cannot try issues of fact. It can

only determine whether there are issues to be tried." Wright, *Federal Courts,* § 99, p. 386. Even if the lower courts did not think respondent's conduct in this case outrageous enough to invoke the estoppel argument on the record as it stood, in view of the direct and material conflict between the parties, petitioner should have been allowed an opportunity to prove or disprove the truth of respondent's denial so that petitioner's estoppel argument could have been given full ventilation. This is especially true where, as here, the knowledge necessary to resolve the dispute is "peculiarly within the knowledge of the moving party." *Id.* at 387.

c. Summary Judgment Is Inappropriate Since There Are Genuine Issues on Material Facts With Respect to Whether Respondent Failed to Have Safety Regulations in Force, or Whether It Failed to Enforce Those Safety Regulations It Had in Force, or Whether Respondent Failed to Provide Petitioner With a Safe Place to Work.

Petitioner, in his affidavit, (R. Vol. I, pp. 76-78) alleged that respondent maintained a safety program with respect to the work McLean was performing for Newport News. He also alleged that respondent's safety personnel should have been supervising the job in question, that they in fact were not, and that respondent provided him with unsafe equipment for the job he was performing. In its answers to petitioner's interrogatories, respondent stated that although it maintained a safety program generally for its own personnel, "it maintained no program dealing with safety, accident prevention or first aid emergency treatment, with regard to the accident which is the subject of this suit." (R. Vol. I, p. 58) Its answers also disclosed that it had no personnel responsible for the supervision of the erection work petitioner was performing; nor did it have any safety personnel assigned

to cover the area of the shipyard in which the accident took place. (R. Vol. I, p. 58)

Clearly there is a conflict between petitioner and respondent on these safety questions. It is difficult to see how these are not "genuine issues on material facts" in this case. Respondent's response below on this point was that, even if true, this is all irrelevant, because it would only tend to demonstrate negligence on the part of respondent and any claim for negligence is barred by the exclusive remedy provision of the Workmen's Compensation Act. Apparently the District Court agreed with respondent's contentions on this matter (App. B-1, B-2); the Court of Appeals failed to comment one way or the other, apparently agreeing with the District Court.

Once again, petitioner submits, the respondent and the courts below have begged the question and have utilized the Workmen's Compensation Act as the illogical answer to petitioner's contentions. In the first place, petitioner's arguments in this regard are directly relevant to its estoppel argument, which, if decided in favor of petitioner, removes the bar of the Act. Clearly the fact that respondent has demonstrated a complete disregard for the safety of its purported statutory employee would be relevant as to whether it should be estopped to plead the Act in defense to petitioner's claims. Moreover, it seems anomalous in the extreme that respondent could act so capriciously towards petitioner, demonstrating a complete disregard for his safety, but at the same time be insulated against its own nonfeasence towards its "employee" by virtue of the "statutory employer" fiction. In addition, a juxtaposition of these answers with those previously noted (*supra,* 5) with respect to the type crane

involved demonstrates that defendant failed to maintain either a safety program or safety personnel to supervise this activity, even though the crane involved was bigger than any crane ever before erected in the shipyard, and only one other crane of this type had been erected before, that crane weighing a little more than one half the crane here in question.

Petitioner also advanced the theory that, given respondent's wanton and reckless misconduct toward him, he should be able to maintain a suit for punitive damages even if respondent is deemed to be petitioner's "statutory employer." The District Court rejected petitioner's theory (App. A-3-A-5); the Court of Appeals failed to pass upon the issue. Again, this issue cannot simply be subsumed under the summary judgment rubric. If respondent has acted in the manner alleged by petitioner—and, for the purposes of deciding a motion for summary judgment, petitioner's allegations must be accepted as true—then there is serious question as to whether respondent's actions should give rise to punitive damages without regard to whether the petitioner has either recovered workmen's compensation, or whether he could recover compensatory damages.

d. Applicable Legal Principles and Conclusion

The general rule which must guide the District Court in disposing of motions for summary judgment is that the moving party has the burden of showing the absence of any genuine issues as to all the material facts applicable under his theory of law. *Evers* v. *Buxbaum,* 253 F. 2d 356 (C.A.D.C., 1958). Moreover,

> "one who moves for summary judgment has the burden of demonstrating clearly the absence of

> any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers." *Hoffman* v. *Partridge,* 172 F. 2d 275, 276 (C.A.D.C., 1949); *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944); *Kress* v. *Downing,* 286 F. 2d 212 (C.A. 3rd, 1960). See 6 Moore's Fed. Prac. (2d Ed.), pp. 2123, 2124, 2125-26.

It is submitted that respondent did not meet this burden and that the District Court, affirmed by the Court of Appeals, erred in granting the motion for summary judgment. Further, it is apparent from the treatment accorded this issue by the lower courts that petitioner did not receive the benefit of this Court's mandate in *United States* v. *Diebold, Inc.,* 269 U.S. 654 (1962) that "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion."

Both lower courts in this case have failed to look beyond the narrow boundaries of the Virginia Workmen's Compensation Act in deciding the questions posed for their consideration. In so doing, the courts have improperly utilized the summary judgment procedure and unduly attenuated petitioner's efforts to develop his various theories of liability.

Finally, both the District Court and the Court of Appeals have failed to articulate the bases underlying the granting of summary judgment. Nowhere do either of the courts come to grips with the "genuine issues of material facts" presented in the case; nowhere do the courts either recognize the conflicts in facts, or explain the materiality or lack of same of the facts

in conflict. The summary and conclusory handling of this question by lower federal courts makes effective review by appellate courts and this Court difficult in the extreme. Petitioner respectfully requests that this Court grant this petition in order that it might review the propriety of this practice; juries, not judges, should try and determine material disputed issues of fact. The matters in issue in this case require and should receive a jury tral. *Byrd* v. *Blue Ridge Electric Corp.*, 356 U.S. 525 (1958). See also *Magenau* v. *Aetna Freight Lines*, 360 U.S. 273 (1959).

Respectfully submitted,

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APPENDIX A

Memorandum

Under a state of facts substantially similar to *McCann* v. *Newport News Shipbuilding and Dry Dock Company*, 177 F. Supp. 909, and other applicable authorities from the Supreme Court of Appeals of Virginia and the United States Court of Appeals for the Fourth Circuit, the defendant's motion for summary judgment must be sustained.

On July 16, 1962, plaintiff, an employee of McLean Contracting Company, was engaged in erecting two cranes which the defendant had purchased in Pittsburgh, Pennsylvania, and which had been shipped to the defendant's shipyard at Newport News, Virginia, in a disassembled condition. McLean was primarily engaged in doing the welding and structural steel work in erecting the cranes, and the defendant, using its own employees and equipment performed the balance of the work. Plaintiff, when injured, was in the area of the crane cab and allegedly was knocked to the ground while assisting other McLean employees in erecting certain structural steel plates on one of the cranes being assembled.

The uncontradicted evidence establishes that the defendant had previously erected a number of cranes, using its own personnel and equipment and, further, that it was capable of doing all of the work necessary to erect such cranes without assistance from McLean or any other party. Where the work of the defendant calls for the use of defendant's caterpillar or crawler-type cranes in other areas of the shipyard operation, or where the defendant's welders are otherwise engaged, McLean frequently takes over this portion of the work.

Defendant is certified by the Industrial Commission of Virginia as a self-insurer under the Virginia Workmen's Compensation Act. Plaintiff applied for and has received (or is still receiving) the benefits from McLean's compensation insurance carrier.

The immediate question thus far is whether plaintiff was a statutory employee of the defendant under § 65-26 of the Code of Virginia, 1950 as amended. We hold that he was and that the work being performed was a part of defendant's normal trade, business or occupation. The defendant was not an "other party" within the meaning of § 65-38. The action is barred under §§ 65-37 and 65-99. *McCann* v. *Newport News Shipbuilding and Dry Dock Company, supra; Sykes* v. *Stone & Webster Engineering Corporation,* 186 Va. 116, 41 S.E. (2d) 469; *Feitig* v. *Chalkley,* 185 Va. 96, 38 S.E. (2d) 73; *Rea* v. *Ford,* 198 Va. 712, 96 S.E. (2d) 92; *Williams* v. *E. T. Gresham Co.,* 201 Va. 457, 111 S.E. (2d) 498; *Anderson* v. *Thorington Construction Company,* 201 Va. 266, 110 S.E. (2d) 396; *Doane* v. *E. I. DuPont de Nemours & Co.,* 4 Cir., 209 F. (2d) 921; *Floyd* v. *Mitchell,* 203 Va. 269, 123 S.E. (2d) 369; *Walker* v. *United States Gypsum Company,* 4 Cir., 270 F. (2d) 857, cert. den. 363 U.S. 805.

Plaintiff's argument that the issue as to whether he was a statutory employee of defendant must be submitted to the jury under the doctrine pronounced in *Byrd* v. *Blue Ridge Electric Corp.,* 356 U.S. 525, and *Magenau* v. *Aetna Freight Lines,* 360 U.S. 273, is sufficiently answered to the contrary in *Walter* v. *United States Gypsum Company, supra.*

An attempt is made to strengthen plaintiff's case by alleging punitive damages and a claim for first aid mishandling immediately following the injury. Assuming, without deciding, that defendant rendered first aid treatment which can be characterized as negligence, it avails the plaintiff nothing. Section 65-86 of the Code of Virginia, 1950 as amended, expressly provides that the consequences of any malpractice shall be deemed part of the injury resulting from the accident and that the injured employees shall be compensated for such malpractice as a part and parcel of the original injury. It is also settled that an employer is liable to pay compensation for any aggravation of the original injury, even if such aggravation arises by

reason of malpractice. *Fauver* v. *Bell*, 192 Va. 518, 65 S.E. (2d) 575; *Lynchburg Foundry Co.* v. *Irvin*, 178 Va. 265, 16 S.E. (2d) 646.

Plaintiff cites certain cases which, at first blush, would appear to support his theory that a separate cause of action exists for the alleged first aid mishandling. *Vessel* v. *Jardine Mining Co.*, 110 Mon. 82, 100 P. (2d) 75; *Ruth* v. *Witherspoon-Englar Co. (Kan.)*, 179 P. 403; *Denes* v. *R. M. Hollingshead Co. (N.J.)*, 145 A. 321; *Shipley* v. *Wellwood Silk Throwing Mills (Tenn.)*, 47 S.W. (2d) 561. The difficulty with these authorities is that the statutes of the various states involved do not call for the mandatory payment by the employer of the medical attention to the employee. Indeed, the *Vessel* case in referring to the Montana statute, states:

> "The Act does not require the employer to furnish medical aid, and there is no hospital contract between appellant and respondent. In jurisdictions where the Act requires the employer to furnish medical aid, or where the employee submits to the employer's selected physician or surgeon, it has been held that the Workmen's Compensation Act is exclusive, on the theory, it would seem, that if the employer is bound to furnish medical aid, or if the employee submits to the employer's selected physician, then the employer should be protected and the Compensation Fund should pay the employee for any additional or new injury sustained. In our opinion the Workmen's Compensation Act of Montana cannot be so construed."

The same rule applies in Kansas, New Jersey and Tennessee. As we know, Virginia requires the employer to furnish medical aid; it requires the injured employee to submit to treatment by the employer's selected physician subject to certain exceptions not here pertinent; and it makes the employer responsible for malpractice. Thus, Virginia follows the general rule as stated in 127 A.L.R. 1110.

Virginia has ruled that, in order to maintain an action for punitive or exemplary damages, a finding of compensatory damages is a prerequisite. *Zedd* v. *Jenkins*, 194

Va. 704, 74 S.E. (2d) 791. Assuming arguendo that, on presentation of the facts, willful action or misconduct on the part of the defendant may be shown, the claim is barred by § 65-37 which provides that the remedies afforded by the Act "shall exclude all other rights and remedies." If such was not the situation, the Virginia Workmen's Compensation Act could be completely thwarted by the simple expedient of alleging punitive damages. Some states reserve to the injured employee the common law remedy caused by willful action or misconduct of the employer. 58 *Am. Jur., Workmen's Compensation,* § 54. Virginia has not reserved this right by statute and, in light of § 65-37, we must conclude that punitive damage actions are not maintainable in such a situation.

Plaintiff relies upon a line of Texas decisions[1] which, plaintiff argues, holds that if the injured employee shows that he would be *entitled* to actual or compensatory damages but for the Compensation Act, then he may recover punitive damages in an appropriate case. To the contrary, the Texas rule is applicable only in cases involving the *death* of the employee under § 26 of Article 16 of the Texas Constitution which provides:

> "Every person, corporation or company that may commit a homicide through willful act or omission, or through gross neglect, shall be responsible in exemplary damages to the surviving husband, widow, or heirs of his or her body or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide."

The Texas Workmen's Compensation Act expressly provides that employees under the Act are deemed to have waived their common law rights to recover damages for injuries sustained in the course of their employment. *Revised Civil Statutes,* Art. 8306, § 3a. However, the Texas

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[1] *Fort Worth Elevators Co.* v. *Russell,* 123 Tex. 128, 70 S.W. (2d) 397; *Morton Salt Co.* v. *White,* 123 Tex. 151, 70 S.W. (2d) 409; *Bonner* v. *Texas Co.,* 5 Cir., 89 F. (2d) 291; *Dudley* v. *Community Public Service Co.,* 5 Cir., 108 F. (2d) 119.

Workmen's Compensation Act, in apparent recognition of the Texas Constitution, provided in *Revised Civil Statutes*, Art. 8306, § 5, the following:

> "Nothing in this law shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body, or such of them as there may be of any deceased employee whose death is occasioned from the willful act or omission or gross negligence of any person, firm or corporation, from the employer of such employee at the time of the injury causing the death of the latter . . . ."

Indeed, the Texas cases involving personal injuries specifically exclude the right to recover punitive or exemplary damages. *Castleberry* v. *Frost-Johnson Lumber Co. (Tex.)*, 283 S.W. 141; *Jones* v. *Jeffreys (Tex.)*, 224 S.W. (2d) 924.

As applied to this case, therefore, the Texas law is in accord with Virginia. We hold that neither the allegation nor proof of punitive damages is sufficient to remove the case from § 65-37 of the Code of Virginia.

Present order following presentation to counsel for plaintiff for inspection and endorsement.

/s/ WALTER E. HOFFMAN
United States District Judge

Order

The Motion for Summary Judgment, previously filed herein by the Defendant, having been duly brought on to be heard, and the Court having filed herein a Memorandum dated August 5, 1965, sustaining the aforesaid Motion, it is accordingly

ORDERED that judgment be, and the same hereby is, entered in favor of the Defendant, dismissing this action.

ENTERED: August 26, 1965

/s/ WALTER E. HOFFMAN
United States District Judge

APPENDIX B

Order

Upon consideration of plaintiff's motion for rehearing filed herein on September 8, 1965, subsequent to the filing of an opinion sustaining a motion for summary judgment on August 5, 1965, and the entry of an order granting summary judgment dated August 25, 1965, it is

ORDERED that the motion for rehearing filed on September 8, 1965, be and it hereby is, DENIED, to which action of the Court the plaintiff excepts.

The Court notes, in the motion for rehearing, that plaintiff now asserts, for the first time, a violation of the Virginia Safety Appliance Act, §§ 40-55 and 40-56, Code of Virginia. The complaint does allege the defendant's duty to enforce safety regulations, but makes no assertion that the crane in question was not protected by adequate safety device. Nor is such contention advanced in the brief filed by plaintiff's counsel, although plaintiff refers to page 3 of his brief relating to regulations which would have prohibited the accident. Moreover, and assuming that the question was inferentially raised in the brief, while the violation of the Virginia Safety Appliance Act may constitute negligence on the part of the actual or statutory employer, there is nothing therein contained which tends to remove the applicability of the Virginia Workmen's Compensation Act. The latter Act is designed to cover situations in which the employer and employee, or either of them, may be negligent. Plaintiff's reliance upon § 65-8, Code of Virginia, 1950, is misplaced. The only purpose of this statute is to negate any relief from *penalty* for failure or neglect to perform any statutory duty. The employer's liability is not based upon tort. *Glassco* v. *Glassco,* 195 Va. 239, 77 S.E. (2d) 843. The word "accident" within comprehension of the Virginia Workmen's Compensation Act includes all accidents actionable at law and all former non-actionable accidents except in case of intentional and willful miscon-

duct on the part of the employee. *Burlington Mills Corporation* v. *Hagood*, 177 Va. 204, 210, 13 S.E. (2d) 291, 293; *Fauver* v. *Bell*, 192 Va. 519, 65 S.E. (2d) 575.

Since any further discovery processes would, at best, lead only to possible proof of a violation of the Virginia Safety Appliance Act, there is no merit to plaintiff's motion for rehearing. Ample opportunity was afforded plaintiff to prepare his case in opposition to defendant's motion for summary judgment. Under date of July 16, 1965, a letter was received from plaintiff's counsel in lieu of a reply brief. In this letter plaintiff's counsel states, "The matter is thus ready for your decision." The opinion was thereafter prepared and filed on August 5, 1965.

/s/ WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
September 14, 1965

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10354

WENDELL EVANS, *Appellant*,

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY, *Appellee*.

Appeal from the United States District Court for The Eastern District of Virginia, at Newport News
Walter E. Hoffman, Chief District Judge

(Argued May 2, 1966 Decided May 11, 1966.)

Before Bryan and Bell, Circuit Judges, and Field, District Judge.

Urban A. Lester (Albert H. Greene, Robert L. Murphy, Robert M. Stefanon, and Larson & Greene on brief) for Appellant, and Phillips M. Dowding for Appellee.

PER CURIAM:

For serious personal injuries suffered by Wendell Evans on July 16, 1962 while working as a welder in the erection of cranes at the Virginia shipyard of the Newport News Shipbuilding and Dry Dock Company, he sued for damages, alleging the company's negligence as the cause of the accident. At the time, he was in the employ of McLean Contracting Company, which had been engaged by the shipbuilding company to install two cranes. The action was dismissed—and rightly we think—on Shipbuilding's motion for summary judgment.

Decision was grounded on the Virginia Workmen's Compensation Act, Code of 1950, as amended, §§ 65-26 and -37, declaring an employee's right to compensation under this statute to be his exclusive remedy. The Act bars a suit

by an employee of a contractor or sub-contractor against the owner of the project if the employee is injured in work which is "a part of the [owner's] trade, business or occupation". Concededly the requirements of the Act have been met and the plaintiff Evans has accepted its benefits.

The record discloses no genuine issues upon the material facts in the case and they bring him squarely within the Act. Hence his sole remedy is the recovery of statutory compensation. This was the view of the District Court in dismissing the action.

Affirmed.

APPENDIX D

"*Section 65-26. Liability of owner to workmen of sub-contractors.* When any person (in this section and Sections 65-28 and 65-29 referred to as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 65-28 and 65-31 referred to as "sub-contractor") for the execution or performance by or under such sub-contractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay any workmen employed in the work any compensation under this Act which he would have been liable to pay if the workmen had been immediately employed by him."

§ 65-37. *Employee's rights under Act exclude all others.*— The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

§ 65-38. *Subrogation of employer to employee's rights against third parties; evidence; recovery; compromise.*—The making of a lawful claim against an employer for compensation under this Act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured

employee or his personal representative, the legal liability of such other party. . . .

§ 65-85. *Duty to furnish medical attention; effect of refusal of employee to accept.*—For a period not exceeding ninety days after an accident the employer shall furnish or cause to be furnished, free of charge to the injured employee, such necessary medical attention, and where such accident results in the amputation of an arm, hand, leg, or foot or the enucleation of an eye or the loss of any natural teeth, the employer shall furnish the initial prosthetic appliance and shall furnish proper fitting thereof, the total cost not to exceed one thousand dollars, as the nature of the accident may require, and the employee shall accept, and during the whole or any part of the remainder of his disability resulting from the injury, the employer may, at his own option, continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician, unless otherwise ordered by the Industrial Commission, and in addition, such surgical and hospital service and supplies as may be deemed necessary by the attending physician or the Industrial Commission. When, in the judgment of the Industrial Commission, or a member thereof, the facts require a reasonable extension of such medical care beyond such period of ninety days, the Commission, or a member thereof, may, in its or his discretion, require the employer to furnish free of charge to the injured employee such medical attention for a reasonable time after the termination of the ninety-day period, but not in excess of two years including such period of ninety days.

The refusal of the employee to accept such service when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the In-

dustrial Commission, the circumstances justified the refusal. In any such case the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical care during the period herein specified, or for other good reasons, a physician other than that provided by the employer is called to treat the injured employee, during said period, the reasonable cost of such service shall be paid by the employer if ordered so to do by the Industrial Commission.

"*Section 65-99. Duty to insure payment of compensation; effect of insurance.* Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified."

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 589

WENDELL EVANS, *Petitioner,*

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, *Respondent.*

Brief In Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Newport News, Virginia
Counsel for Respondent

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---

Respondent, Newport News Shipbuilding and Dry Dock Company, respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit rendered in this case on May 11, 1966, and prays that said Petition be denied.

JURISDICTION

Respondent submits that the jurisdictional statement on page 2 of the Petition is wholly inadequate. Reference is made to 28 U.S.C. Section 1254(1) which authorizes this Court to review "any civil case". However, the statement completely fails to take into consideration the provisions of Rule 19 of the Revised Rules of this Court which sets forth the general nature of the reasons which this Court will consider as special and important reasons. Nowhere in the Petition is it even remotely suggested that the Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, or that it has decided an important state question in a way in conflict with applicable state law. Furthermore, there is absolutely no question of Federal Law or any Federal question in any way involved in this case, and there is absolutely nothing in the Petition or the record to indicate that the Court of Appeals for the Fourth Circuit so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for the exercise of this Court's power of supervision. The very best that can be gleaned from the record and the Petition is that Petitioner's case was decided adversely to him by both the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit after a full and complete hearing in both Courts in strict accordance with the Rules. Both Courts applied a rule of law which is well established in Virginia by statute and by various decisions of both the Supreme Court of Appeals of Virginia and the United States Court of Appeals for the Fourth Circuit applying Virginia law. Respondent submits that the

mere fact that the Petitioner's case was decided adversely to him is not sufficient reason to invoke the jurisdiction of this Court on Writ of Certiorari.

QUESTION PRESENTED

The manner in which Petitioner has stated what he contends to be the question involved in this case serves to point up the position of the Respondent that there is no question involved in this case which would justify review by this Court. Petitioner, in extremely self-serving language, has not actually set forth any Federal question or Constitutional issue which should be decided by this Court, but has merely made four argumentative statements which are wholly unsupported by the record and amount to no more than reasserting the same contentions which were presented to, and rejected by, both the District Court and the Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct with the exception of certain statements contained on page 5 of the Petition. These statements clearly reflect that the Petition was written by an attorney who did not participate in the proceedings in either the District Court or the Court of Appeals for the Fourth Circuit, and who, apparently, has made only a rather cursory examination of the record. For example, it is stated on page 5 that Respondent's Answers to Interrogatories disclose that "most" of the cranes erected in Respondent's Shipyard during the period 1948-1962 were erected in conjunction with McLean. The fact of the matter is that the original Affidavit filed by Respondent in support of the Motion for Summary Judgment (Appendix A) discloses that

during this period thirteen cranes had been erected by Respondent using its own personnel and equipment solely. Respondent's answer to Further Interrogatory 1(b) (Appendix B) shows that Respondent erected only twelve cranes in conjunction with McLean during this period. Of course, the type and weight of the cranes involved has nothing whatever to do with the issues raised on Summary Judgment, but Respondent points this out as an example of the inaccurate and self-serving statements which appear throughout the Petition.

ARGUMENT

Before discussing briefly the matters set forth in headings *a* through *d* on pages 7 through 15 of the Petition, Respondent would emphasize to this Court that there has never been but one material issue of fact in this case, i.e., whether or not the work in which Petitioner was engaged at the time of his injury was a part of the normal trade, business and occupation of Respondent. Comprehensive and detailed affidavits were filed in the District Court showing conclusively that the work was a part of the Respondent's trade, business and occupation and not one word is contained in the only counter-affidavit filed by the Petitioner in the District Court to suggest that it was not. No affidavit was ever filed by Petitioner in the District Court that contrary essential facts were unavailable, and no motion for a continuance of the regularly scheduled hearing on the Motion for Summary Judgment was ever made. This one key fact stood uncontradicted and undisputed on the day the Motion for Summary Judgment was heard, as indeed it does today.

In Virginia, it has been the well-established law both by statute and judicial interpretation that if a work-

man is injured while engaged in work which is part of the trade, business and occupation of the person for whom the work is being done, his remedy is limited to Workmen's Compensation benefits and no common law action for damages can be maintained against the person for whom the work was being done.

In the case of *Williams* v. *E. T. Gresham Co.*, 201 Va. 457, 111 SE (2d) 498 (1959), the plaintiff was an employee of Chesapeake Bay Ferry District, which had contracted with the defendant, E. T. Gresham Co., to make certain repairs to its dock facilities. The plaintiff was assigned by his employer to work with the defendant's employees on the job, and while so engaged was injured by a falling block. The Plaintiff applied for and received workmen's compensation benefits from the Ferry District, his employer. The Virginia Supreme Court of Appeals held that the plaintiff's exclusive remedy was under the Workmen's Compensation Act, and that the common law action could not be maintained. In reaching this conclusion the Court said the following:

> "There is no material conflict in the evidence and it conclusively shows that defendant was engaged in work, at the time of plaintiff's injury, which was a part of the trade, business or occupation of the owner, Ferry District, and that defendant was not a stranger to the work. Both defendant and Ferry District were under the canopy of the Workmen's Compensation Act and not subject to an action at law by plaintiff, Ferry District's employee, for damages on account of injuries he received while engaged in the same work. Section 65-37, supra. Therefore, defendant was not an other party" within the purview of Section 65-38, supra, and amenable to such an action at law."

The same interpretation of Virginia law is followed by the Court of Appeals for the Fourth Circuit and a clear example is found in the case of *Doane* v. *E. I. DuPont de Nemours & Co.*, 209 Fed. (2d) 921 (4th Cir. 1954). The case involved a suit by an employee of Texas Company, alleging negligence on the part of an independent contractor employed by Texas Company. At the time the injury was sustained the plaintiff was engaged in certain work in connection with the cleaning of a tank. This Court, speaking through Judge Soper, held that the action could not be maintained under the Virginia law. The Court reviewed the pertinent Virginia decisions and then said the following:

> ". . . As we read these decisions the decisive question is whether the claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done. If a workman is so engaged, he is covered by the compensation which the owner of the business is obliged to furnish, and *he has no right of action against anyone else engaged in the same operation.*" (emphasis supplied).

Respondent therefore submits that Petitioner was clearly a "statutory employee" of Respondent at the time of his injury and under Virginia law there is not the slightest, remotest question that an action for damages cannot be maintained against Respondent.

Respondent will now undertake to discuss the various points raised on pages 7 through 15 of the Petition and will use the same headings used in the Petition.

a. Summary Judgment Was Inappropriate on the Question of Whether Respondent Was a Statutory Employer of Petitioner.

Petitioner first suggests that answers made by Respondent to certain Interrogatories created material issues of fact. However, the Petition completely fails to explain how the type and weight of the crane in question could possibly be material in view of the undisputed fact that erection of cranes of all types was a part of the Respondent's normal trade, business and occupation. The total irrelevance of this issue is made clear by the fact that in Virginia it makes no difference whether the owner had ever actually done the work in question, if in fact the work is part of the owner's normal trade, business and occupation. This was the holding of the Supreme Court of Appeals of Virginia in *Williams* v. *E. T. Gresham Co.*, 201 Va. 457, 111 SE (2d) 498 (1959), where an employee of Chesapeake Bay Ferry District attempted to maintain a negligence action against E. T. Gresham Co., which company had been employed by Ferry District to perform certain pile driving work. The Virginia Supreme Court of Appeals held that the action was barred because the work was part of the trade, business and occupation of Ferry District and Plaintiff, a carpenter, was also engaged in the work at the time his injury was sustained. This conclusion was reached by the Court despite the fact that Ferry District had *never* owned a crane and alone had *never* attempted to drive piles. Equipment had always been secured elsewhere for pile driving, and the actual operation of the crane involved was completely under the control of the Defendant. Furthermore, the Defendant selected the equipment and hired and trained the personnel to operate it. The Plaintiff and other maintenance employees of Ferry District and

Defendant's employees worked together on the job. Despite these facts, the Court had little difficulty concluding that the action was barred. In the case of *Anderson* v. *Thorington Construction Co.*, 201 Va. 266, 110 SE (2d) 396 (1959), the Plaintiff as supervising certain construction work on a turnpike when he was injured and brought a negligence action against the Turnpike Authority. Again, the Court held that the action was barred because the work was part of the trade, business and occupation of the Turnpike Authority, and this result was reached by the Court despite the fact that the Turnpike Authority maintained *no force of employees* to do the type work in which the Plaintiff was engaged at the time of his injury, and *always* awarded contracts for this type work to independent contractors.

The Petitioner next suggests to this Court that the granting of Summary Judgment by the District Court was "premature" by which he apparently means to imply that he was not given an adequate opportunity to prepare for the hearing on the Motion for Summary Judgment. Respondent submits that the record in this case clearly shows that Petitioner had more than an adequate opportunity to complete any preparation or discovery as to facts which were material to the issue involved.

First of all, Respondent would respectfully call the Court's attention to the time lapse between the various phases of the proceedings in the District Court. Respondent filed its Answer in this case on August 5, 1964, and the tenth defense in that Answer fully and completely stated the same defense which was later embodied in the Motion for Summary Judgment. Under these circumstances, it certainly cannot be contended

by the Petitioner that he was taken by surprise by the Motion for Summary Judgment. The Motion for Summary Judgment was then filed accompanied by detailed affidavits and a lengthy Brief in support thereof on December 10, 1964, slightly over four months after the filing of the Answer. During this four month period, absolutely no effect of any nature whatsoever was made by the Petitioner to institute any discovery procedures. The Petitioner propounded Interrogatories on December 18, 1964, and further Interrogatories on January 19, 1965, and both sets of these Interrogatories were fully answered by the Respondent on February 15, 1965.

Perhaps one of the most significant dates is January 22, 1965, at which time an Initial Pre-Trial Conference was held. An Order was entered on the same day, which is printed as Appendix C, providing that a hearing would be held on the Motion for Summary Judgment on April 9, 1965; setting dates for filing Briefs by the parties; and providing that it was understood by all counsel that no testimony would be presented at the hearing.

The Petitioner's Brief in opposition to the Motion was filed on March 10, 1965, which Brief argued that the Motion was premature, but did not seek a continuance of the hearing on the Motion.

The record therefore shows conclusively that Petitioner had over eight months from the date Respondent's answer was filed until the hearing was held on the Motion for Summary Judgment to fully prepare himself for the hearing and to utilize any of the multitude of discovery procedures available under the Federal Rules.

Petitioner further contends that he was prevented from taking the deposition of W. F. Metts who signed Respondent's Answers to Interrogatories. An examination of the record will again show that the Notice to take the deposition of Mr. Metts was filed on April 9, 1965 (not April 6, 1965 as stated on page 8 of the Petition) which was the very day that the hearing on the Motion for Summary Judgment was scheduled, which hearing date had been *agreed upon by all counsel* at the Initial Pre-Trial conference held on January 22, 1965. Furthermore, the Notice stated that the deposition would be taken on April 28, 1965 which was in fact nineteen days after the hearing on the Motion for Summary Judgment was held. Respondent cannot believe that such an assertion would be made by counsel for Petitioner if he had personally participated in the proceedings in the District Court. The fact of the matter is that at the hearing held on April 9, 1965, counsel then representing Petitioner stated to the District Judge and to this counsel that the depositions of Mr. Metts and the other parties named in the Notice were designed solely to uncover possible acts of negligence on the part of the Respondent, and that evidence of negligence would be totally irrelevant if the Motion for Summary Judgment was sustained. If, in fact, Petitioner had wanted to take the deposition of Mr. Metts in connection with the issues involved on Summary Judgment, certainly this should have been done prior to the hearing on the Motion for Summary Judgment. Furthermore, the July 5th, 1965 cut off date in the Initial Pre-Trial Order (Appendix C) was certainly not the date for discovery as to facts pertinent to the issues on Summary Judgment when the very same Order scheduled the hearing on the Motion for Summary Judgment for April 9, 1965. The very pur-

pose of setting a hearing on the Motion for Summary Judgment on April 9th was to dispose of the issues raised by the Motion at an early date, and for counsel for Petitioner to assert to this Court that Petitioner had, under the terms of the Order, until July 5, 1965 to discover evidence pertaining to the Motion to be heard on April 9, 1965 is nothing short of incredible.

b. Summary Judgment Is Inappropriate Where There Is Genuine Issue Between the Parties as to Material Facts, Especially Where the Resolution of the Dispute Is Important to the Development of a Theory of Liability of the Non-Moving Party.

In this section of the Petition an extraordinary theory of "estoppel" is again asserted by Petitioner despite the fact that it was presented to the District Court and the Court of Appeals for the Fourth Circuit and rejected by both of these tribunals. Petitioner says that the Affidavit of the Petitioner himself filed in opposition to the Motion for Summary Judgment shows that Respondent "rejected" its employment relationship with Petitioner and should therefore, be estopped from relying on the Virginia Workmen's Compensation Act. It is interesting to note that absolutely no authority whatsoever is cited in support of this incredible contention. Furthermore, the pertinent portion of Petitioner's Affidavit is reproduced as Appendix D and an examination of this Affidavit will show that the so called "rejection" of employment relationship consisted of sending the seriously injured Petitioner from Respondent's First Aid Station to the hospital. Respondent respectfully submits that this contention is so absurd on its face as to not merit further comment in a brief in this Court.

This section also again goes into the claim that Petitioner was "mishandled" by Respondent's First

Aid personnel. The answer to this can be found in that portion of the District Court's opinion reproduced on pages A-2 and A-3 of the Petition. The opinion and the authorities cited therein clearly show that even if Petitioner was "mishandled" a separate action for damages cannot be maintained under Virginia law. In view of this portion of the District Court's opinion it is rather difficult to understand the statement on page 10 of the Petition that neither Court "came to grips" with the question of whether the Petitioner was "mishandled". The District Court in fact devoted a substantial portion of its opinion to this question and the fact that it was not discussed in the opinion of the Court of Appeals for the Fourth Circuit obviously means that that Court felt the District Court was so clearly right that further comment was not required.

c. Summary Judgment Is Inappropriate Since There Are Genuine Issues on Material Facts With Respect to Whether Respondent Failed to Have Safety Regulations in Force, or Whether It Failed to Enforce Those Safety Regulations It Had in Force, or Whether Respondent Failed to Provide Petitioner With a Safe Place to Work.

In this section Petitioner says that Summary Judgment should not have been granted since there were conflicts in the record as to whether or not Respondent maintained or enforced certain safety measures. This theory was presented to both the District Court and the Court of Appeals for the Fourth Circuit and rejected by both. The Order of the District Court reproduced on pages B-1 and B-2 of the Petition states clearly that any violation of safety rules or statutes would only amount to negligence, and as stated on page 12 of the Petition, this would all be irrelevant "because it only tends to demonstrate negligence on the part of the Respondent and any claim of negligence is barred

by the exclusive remedy provision of the Workmen's Compensation Act".

This section also contains the ridiculous statement that Respondent acted capriciously toward Petitioner and demonstrated a complete disregard for his safety. The only thing in the record on which to base this statement is the portion of Petitioner's affidavit reproduced as Appendix D. An examination of this affidavit will show that what Petitioner is talking about is that Respondent sent the Petitioner to the hospital and this is supposed to be capricious conduct showing a complete disregard for his safety.

This section also mentions Petitioner's claim that he is entitled to maintain a separate action for punitive damages which claim is again answered completely by the portion of the opinion of the District Court reproduced on pages A-2 through A-5 of the Petition. Respondent does not agree with the accusation on page 13 of the Petition that the Court of Appeals for the Fourth Circuit "failed" to pass upon this issue. The fact of the matter is that again the Court of Appeals felt that the opinion of the District Court was so clearly correct that no further elaboration was required.

d. Applicable Legal Principles and Conclusion.

Respondent agrees with the general statements made in this section pertaining to Summary Judgment, but submits that these statements have no bearing on this case because there has never been any conflict as to a material issue. It is for this type situation that the Summary Judgment procedure was designed. The whole purpose of the Summary Judgment procedure would be defeated if a case of this nature, which should never have been brought in the first place, and which

was in fact filed the day before the Statute of Limitations would have run, could be forced to trial by merely contending that some issue exists.

Both the appropriateness of Summary Judgment in this type of case and the complete answer to Petitioner's contention that he is entitled to a jury trial can be found in the following language of Chief Judge Haynesworth in the case of *Walker* v. *United States Gypsum Company,* 270 F. (2d) 857 (C.A. 4th, 1959):

> "Under these circumstances, we need not, indeed we may not, speculate about Virginia's resolution of this precise question. Under Byrd and Magenau, we must treat the plea as an affirmative defense and hold that any issue of fact involved should have been submitted to a jury, as demanded by the plaintiff."
>
> "It certainly does not follow, however, that, if there is no issue of fact genuinely in dispute, the question of employment status must be submitted to a jury. Whether the Industrial Commission or the common law court is the exclusive and appropriate forum for the adjudication of the rights of the injured claimant is a preliminary question, related only collaterally to the substantive cause of action. This sort of question is peculiarly appropriate for summary judgment when there is no genuinely disputed issue of fact. The parties should not be put to a long and expensive trial only to have the Court discover at the end that the case should have been brought in another tribunal. Nor should the parties and the public suffer the delay and dislocation which necessarily follow if crowded jury trial dockets are burdened with cases in which there is no triable issue. Rule 56 Fed. Rules Civ. Proc. 28 U.S.C.A., is designed to insure that they need not."

In the case at bar the Court of Appeals for the Fourth Circuit, precisely as it did in the *Walker* case, concluded that there was no genuine issue of fact and held that the District Court properly entered Summary Judgment. Any possible conflict between the *Walker* case and the *Byrd* and *Mageneau* cases cited on page 15 of the Petition was resolved when certiorari was denied in the *Walker* case by this Court on May 31st, 1960 (363 U.S. 805). This same problem was reviewed subsequent to the *Walker* case by the United States District Court for the Eastern District of Virginia in *McCann* v. *Newport News Shipbuilding and Drydock Company,* 177 F. Supp. 909 (U.S.D.C., E.D. Va., 1959), wherein Chief Judge Hoffman stated:

> "Plaintiff insists that a jury question has been presented under the authority of *Byrd* v. *Blue Ridge Electric Cooperative,* 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. (2d) 053, and *Mageneau* v. *Aetna Freight Lines, Inc.,* 360 U.S. 273, 79 S. Ct. 1184, 3 L. Ed. (2d) 1224. Recognizing the binding effect of these judicial pronouncements, it does not follow that the employment status of an individual must be submitted to a jury where the facts are not in dispute. In the instant proceeding the respective motions for summary judgment are supported by comprehensive affidavits which are not controverted by plaintiff. In the recent case of *Walker* v. *United States Gypsum Company,* 4 Cir., F. (2d) (decided October 5, 1959), Judge Haynesworth discussed the problem at length in a case involving the employment status of an individual found to be a statutory employee under the Virginia Act. Relying upon *Walker* we find nothing herein to justify jury action upon the admitted facts."

CONCLUSION

Respondent respectfully submits that there is absolutely nothing in the record or the Petition to show that there is any special or important reason for this Court to review this case on a Writ of Certiorari. Respondent vigorously disagrees with the accusations scattered throughout the Petition that Chief Judge Hoffman of the Eastern District of Virginia and Circuit Judges Bell and Bryan and Circuit Judge-Designate Field failed to examine the facts in the case and failed to discharge their obligation to give Petitioner's case a fair and impartial hearing. On the contrary, it is the position of Respondent that the record in this case shows beyond any question that Petitioner has been given a full and fair hearing and opportunity to present his case in accord with the Federal Rules in both the District Court and the Court of Appeals for the Fourth Circuit. The fact that both of these Courts rejected the various claims of the Petitioner as being clearly without merit is wholly insufficient to merit review by this Court.

Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

PHILLIPS M. DOWDING
215-29th Street
Newport News, Virginia
Counsel for Respondent, Newport News Shipbuilding and Dry Dock Company.

AFFIDAVIT NO. 1

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 1017

WENDELL EVANS, *Plaintiff*,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a Virginia corporation, *Defendant*.

Affidavit

STATE OF VIRGINIA

City of Newport News, to-wit:

This day personally appeared before me, the undersigned Notary Public in and for the City and State aforesaid, JOHN W. IRVINE, who made oath and said as follows:

I am John W. Irvine, and I reside at 7 Douglas Drive, Newport News, Virginia. Since 1933 I have been employed by the Newport News Shipbuilding and Dry Dock Company, Newport News, Virginia (hereinafter referred to as Shipyard), which company has for many years been engaged in the building and repairing of naval and merchant vessels and the manufacturing of hydraulic turbines and accessories and other heavy machinery at its plant in the City of Newport News, Virginia. Since 1954 I have held the position of Plant Engineer of the Shipyard, and as such I have overall responsibility for, and supervision of, the purchase, installation and maintenance of all plant equipment.

In May of 1962 the Shipyard purchased two (2) used American Hoist and Derrick Model R-15 Whirler Cranes from McKees Rocks Industrial Enterprises, Pittsburgh, Pennsylvania. These cranes were shipped by rail to the Shipyard in a knocked down or disassembled condition.

Thereafter, the Shipyard contracted with McLean Contracting Company (hereinafter referred to as McLean) to furnish certain labor and equipment in connection with the erection of these cranes. The work to be done by McLean consisted primarily of welding and structural steel erection. The shipyard, using its own employees and equipment, installed the crane tracks (rails, ties and ballast), the diesel-driven generators and fuel tanks for the cranes, and performed all electrical and piping work, all painting, and certain work involving the cab and the fittings.

The Plaintiff, Wendell Evans, an employee of McLean Contracting Company, was injured on July 16, 1962, while performing certain structural steel erection work in connection with the erection of one of the aforesaid cranes located on the north side of the Shipyard, west of the former Barge Basin near No. 16 lateral railroad tracks.

Many various types of cranes are owned and used almost constantly by the Shipyard in connection with carrying out its business of building and repairing naval and merchant vessels and manufacturing hydraulic turbines and accessories and other heavy machinery. The erection of cranes of all types is an integral part of the normal trade, business and occupation of the Shipyard, and the Shipyard is perfectly capable of erecting any type of crane, using its own personnel and equipment exclusively. For example, the following is a list of cranes which have been erected in recent years by the Shipyard, using solely its own personnel and equipment:

Crane	Location	Date of Erection
Eight (8) 15 ton Bridge Cranes	Shipway No. 8 and 9	January 1964
One (1) 15 ton Gantry Crane	Scrap Yard	February 1963
One (1) 100 ton Bridge Crane	Erecting Shop	March 1958
One (1) 50 ton Bridge Crane	Foundry	February 1958
One (1) 15 ton Gantry Crane	Barge Basin	February 1955
One (1) 40 ton Bridge Crane	Foundry	March 1949

The primary reason for contracting with McLean to perform a portion of the work in connection with the erection of the aforesaid two cranes was two-fold. First of all, the shipyard's own caterpillar or crawler-type cranes which are used to hoist the steel plates into position were being used in connection with other work being performed in another part of the Shipyard. Secondly, at the particluar time that these cranes were erected most of the shipyard welders were engaged in other pressing work. It was for these reasons that the Shipyard concluded it would be advantageous to have McLean perform a portion of the aforesaid erection work.

I know from my own personal knowledge that on July 16, 1962, for many years prior to that date, and at all times subsequent to that date the Shipyard was subject to the provisions of the Virginia Workmen's Compensation Act, and was certified by the Industrial Commission of Virginia as a self-insurer, in accord with Section 65-100 of said Act.

JOHN W. IRVINE
John W. Irvine

SUBSCRIBED AND SWORN to before me this 2nd day of November, 1964. My commission expires on the 10th day of February, 1968.

VIRGINIA BURDIGE ADAMS
Notary Public

APPENDIX B

Respondent's answer to Petitioner's Further Interrogatory 1(b):

Type of Crane	*Date of Erection*	*Location*
Four (4) 56 ton American cranes	1948-1949	Area of Shipways No. 5, 6 and 7
Two (2) 22½ ton American cranes	1948-1949	Area of Shipways No. 5, 6 and 7
One (1) 25 ton Dravo crane	1949	Area of Shipways No. 5, 6 and 7
One (1) 60 ton Clyde Whirler crane	1962	Area of Shipway No. 7
Two (2) 15 ton American cranes	1962	North Side
One (1) 100 ton Bridge crane	1964	Shipway No. 9
One (1) 100 ton Bridge crane	1964	Shipway No. 8

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 1017

WENDELL EVANS, *Plaintiff(s)*

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, *Defendant(s)*

(Third-Party Plaintiff(s))

v.

Third-Party Defendant(s)

Order on Initial Pre-Trial Conference

Subject to any special appearance, questions of jurisdiction, or other motions now pending, all as heretofore filed, the parties having advised the Court that certain processes of discovery are contemplated and not completed, it is

ORDERED that the parties do propound interrogatories, file motions for the production of documents and/or requests for admission of facts and genuineness of documents and/or take discovery depositions of witnesses and/or parties according to the following schedule:

By the plaintiff(s)—To commence forthwith the processes of discovery in order to have completed the same on or before July 5, 1965.

By the defendant(s) and/or third-party plaintiff(s)—To commence forthwith the processes of discovery in order to have completed the same on or before August 4, 1965.

By the third-party defendant(s)—To commence forthwith the processes of discovery in order to have completed the same on or before ——.

If a party does not complete the processes of discovery on or before the aforesaid date such party shall be precluded from thereafter attempting to discover, unless by leave of Order first granted and by showing good cause why the processes of discovery were not completed or to the time limit specified herein; but nothing contained herein shall be construed as preventing the further use of discovery by a party if an opposing party brings out matter at the time of discovery which may, in the discretion of the Court, justify additional discovery proceedings.

The time required to transcribe discovery depositions shall not be considered in determining the completion dates of discovery.

The Court reserves the right to permit discovery depositions of a party or witness who is a non-resident or otherwise unavailable, at any time prior to trial, but such permission must be granted by the Court in the absence of agreement of counsel.

This case is set for trial on October 13, 1965 at Newport News. The matter is set for a further pre-trial conference on September 10, 1965, at 2 P.M. at Newport News. At least 15 days in advance of the further pre-trial conference or, in the event no further pre-trial conference is scheduled, at least 15 days in advance of trial, counsel shall meet and confer as to matters provided for under Local Rules. Such meeting of counsel will be in the offices of counsel for defendants on August 25, 1965, at 2 P.M.

All de bene esse depositions shall be concluded on or before August 18, 1965.

Trial by jury has been demanded at the initial pretrial conference.

A hearing on the motion for summary judgment will be conducted at Norfolk on April 9, 1965, at 9 a.m. The defendant's brief in support of its motion for summary judgment was filed on December 10, 1964. Plaintiff agrees to file a brief in opposition to said motion on or before March 9, 1965; and counsel for defendant is granted until April 1, 1965, within which to file a reply to defendant's brief. It is understood that no testimony will be presented at the time of the hearing on the motion for summary judgment, but that counsel do desire oral argument, which will be heard at that time.

Date: January 22, 1965

/s/ WALTER E. HOFFMAN,
United States District Judge

APPENDIX D

Extract from Affidavit filed by Petitioner in District Court:

"The ambulance was from the Newport News Shipbuilding Company there. They had their First Aid men and driver who came down. They wanted to pick me up to put me on the stretcher and hadn't examined any of my injuries. They didn't know what was wrong and I was trying to tell them that there was something wrong with my back. They picked me up by the shoulders finally and put me on the stretcher. They picked me up the wrong way and aggravated my injuries. They loaded me onto the ambulance and took me to the First Aid Station in the shipyard in the shipyard's ambulance. So I was in the meantime lifted bodily around the shoulders and legs off of the stretcher that came from the ambulance onto the wagon to this high table. This aggravated my injuries. I went in and they started to clean up some of the injuries on my face and my knee and asked me what had happened, who to call in an emergency and I gave them all the information that they had asked for. They found that I was an employee of the McLean Contracting Company so they said they couldn't take care of me there but they would send me to the Riverside Hospital. I was lifted off the stretcher onto the hospital table by the Newport News dispensary personnel. After they discovered that I was an employee of the McLean Contracting Company and was told to send me to Riverside they took me off the table back onto the stretcher. This aggravated my injury. I don't know exactly how much time passed then but I judge around 45 minutes elapsed. Then they sent me on up in the shipyard ambulance to Riverside Hospital where they took me to the emergency room."